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THE MONTANA ECONOMIC LAND DEVELOPMENT ACT

An analysis by the

MONTANA DEPARTMENT OF COMMUNITY AFFAIRS

HELENA, MONTANA

Judith H. Carlson, Director

Harold M. Price, Administrator
Planning Division

Jim E. Richard, Chief
Local Planning Services Bureau

Richard M. Weddle
Land Use Attorney

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The Montana Economic Land Development Act, commonly referred to as MELDA or House Bill 672, represents an innovative attempt to encourage economic expansion and to solve such land use problems as urban sprawl, loss of prime agricultural land, and deterioration of central business districts. In seeking a more desirable use of land, the Act departs from the traditional regulatory approach to these problems. Instead it employs a complex system of property tax incentives and penalties to obtain voluntary compliance with land use plans.

Briefly summarized, the Act requires all cities and counties in the state to develop a land use "plan" based primarily on land capability. It provides that once this plan has been adopted locally and approved by the State Department of Revenue, property valuation for taxation purposes shall be based on whether or not land is being used in conformance with the plan. Conforming uses are to be encouraged through reduction of property valuation, and nonconforming uses are to be penalized by the imposition of higher valuations.

The use of tax incentives to encourage economic growth and desirable land use has both theoretical appeal and practical utility. A number of states have tax laws designed to encourage rehabilitation and improvement of real properties, conservation of agricultural land,

preservation of open space and development of industrial properties. In fact, Montana tax law, exclusive of MELDA, includes provisions for all of the foregoing.[1] In order to achieve their objectives, such laws must be very specific and carefully meshed with other taxation and land use statutes. MELDA, however, appears to suffer substantially from faulty integration with other statutes, lack of clarity, and internal inconsistencies. In addition, the cost of implementing the Act, if it were possible, appears to be prohibitive, and the magnitude of its impacts on tax revenues are virtually unpredictable.

The following discussion of MELDA consists of two parts. Part One explores the feasibility of achieving the legislative goals expressed in MELDA through the Act's conceptual framework. Part Two, on the other hand, addresses the Act's inherent technical difficulties which have been broadly categorized as internal problems, conflicts with other statutory provisions, practical or administrative shortcomings, and potential conflicts with constitutional principles.

PART ONE

Perhaps the most important question to be asked of MELDA is whether it could achieve its basic objective of attaining good land

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[1] a) Rehabilitation and improvement of properties -- sections 11-3901 through 11-3925 (Urban Renewal) and sections 84-301 and -302; b) conservation of agricultural land -- sections 84-437.1 through 84-437.17 ("Greenbelt Act"); c) preservation of open space -- sections 62-601 through 62-613 (Open-Space Land and Voluntary Conservation Easement Act); d) development of industrial properties -- sections 84-301 and 84-302 (class seven industrial property).

use through taxation if the technical problems typified by the examples supplied in the following section could be overcome through amendment or administrative rule-making. MELDA's goals as set out in section 84-7503 may be paraphrased as follows:

1. Protect prime agricultural land;
2. Encourage higher densities in urban areas and constrain urban sprawl, thus providing more open land;
3. Guide commercial and industrial development;
4. Accomplish the preceding through a program of local control with land use decisions left, whenever possible, with the land owners; and
5. Provide Montana with a land use policy which motivates economic growth in a desirable pattern through the voluntary action of private enterprise without excessive regulations.

Protect Prime Agricultural Land

The major goals of MELDA -- to protect farmland, increase urban densities and provide open land -- are interrelated, and their attainment will depend on the effectiveness of MELDA's incentives and disincentives relating to the conversion of agricultural land and urban sprawl. MELDA's offer of a 10 to 20 percent reduction of appraised value in return for agreements to keep land in agricultural use for 10 or 25 years (section 84-7510) may, at first blush, seem to promise success in protecting agricultural land, inhibiting sprawl and increasing urban densities. It would also seem that MELDA's imposition

of a 10 percent increase in the appraised value of agricultural land or a 10 year roll-back tax penalty would deter a land owner from keeping his options open and converting when the price was right [section 84-7510(1) and (4)]. However, in order to assess the potential effectiveness of these provisions they must be placed in the context of Montana's approach to taxing agricultural land.

Montana law requires that all real property be taxed according to its true market value except agricultural land which is to be taxed according to its agricultural productivity [sections 84-401(2) and 84-437.3]. As a result, taxes paid on agricultural land are generally low, sometimes extremely low, in relation to any speculative (non-agricultural) value the land may have. In 1974, the average tax paid on Montana agricultural land ranged from 14 cents to $1.33 per acre, depending on its classification. Statewide, the average tax paid on all agricultural land was 30 cents per acre. In Yellowstone County, in 1974, the average tax per acre paid on irrigated land was $2.31, on non-irrigated land, 86 cents, and on grazing land, 12 cents. The average millage in Yellowstone County was 155.30, the sixth highest in the state.[2]

Montana's irrigated valley land would be considered "prime" for MELDA's purposes, and its retention in agricultural use is certainly desirable. This same land is also commonly subject to intense development pressures and, as a result, is frequently fragmented and taken out of production by urban sprawl. Using Yellowstone County as an

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[2] Report of the Montana Department of Revenue for the period July 1, 1972 to June 30, 1974.

example (where the average tax per acre of irrigated land is $2.31) the farmer with 200 acres of such land could, by pledging not to convert it to non-agricultural use for at least 25 years, anticipate a total annual tax savings of only $92.40. His tax savings might be even less than this, however, if the county is forced to increase its mill levy to replace revenues lost as a result of MELDA [see section 84-7520(2)].

MELDA's agricultural incentives would appear to be even less effective in influencing decisions to develop non-irrigated, grazing, and wild hay lands because the taxes on these classes of land (which in 1974 averaged 14 cents, 68 cents, and 68 cents per acre respectively) are greatly overshadowed by the rancher's taxes on livestock, machinery, and other personal property.

As previously mentioned, MELDA provides for a 10 percent reduction in taxes if the farmer or rancher agrees not to convert his land to non-agricultural uses for a period of 10, rather than 25, years [section 84-7510(3)]. Because it is nearly as hazardous to predict economic conditions 10 years into the future as it is 25 years and the incentive is so slight, there is little chance that this provision of MELDA would have any influence on land use decisions. Furthermore, it appears unlikely, that non-conversion agreements could be obtained if development pressures or trends in land transactions suggest to the agriculturalist that his land has economic value well beyond that based on its productivity. The tax savings are too minimal and too uncertain; and, if the land has speculative value, the land owner's economic options are too severely restricted.

In addition to the non-conversion agreement approach, MELDA provides another tax scheme, the roll-back tax, to encourage the retention of productive land in agricultural use [section 84-7510(4)].[3] Under this scheme, when "Class C" agricultural land is converted to a non-agricultural use it would be subject to a tax penalty consisting of the difference between the taxes actually paid on the land during the previous 10 years and the taxes which would have been paid had the provisions of MELDA not been in effect. Using the statewide average taxes paid on non-irrigated and wild hay land, the maximum roll-back penalty would amount to approximately 80 cents per acre. Again, it seems doubtful that such an insignificant tax penalty would have any effect on decisions to develop agricultural land.

In summary, MELDA's concept of inhibiting the conversion of agricultural land by adjusting its appraised value suffers from a number of flaws. The most significant is simply that taxes on agricultural land are so low in relation to any speculative value the land may have that the adjustments offered by MELDA could not be expected to have any important impact on landowners' decisions to keep the land in production or sell to a developer. Even if the reduction in appraised value were significant, the landowner would have no assurance that he would realize a reduction in taxes. Because MELDA does not control

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[3] A recent study of Montana's "Greenbelt Law" (sections 84-437.1 through 84-437.17, R.C.M. 1947) indicates that to the extent that it affects land use decisions, that law's roll-back tax penalty, similar to the one imposed by MELDA, may actually encourage the non-agricultural development of the state's best farm and ranch land and contribute to inefficient and environmentally harmful "leap frog" development. See Differential Taxation and Agricultural Use, Planning Information Paper, October 1975, Montana Department of Community Affairs.

millage, it is possible that mill levies could so increase that the taxes he pays after receiving his MELDA tax break actually exceed those he paid before entering into the non-conversion agreement.[4]

Achieve Goals of Act Through a Program of Local Control

A stated goal of MELDA is to leave land use decisions at the local government level, or where possible, with the landowner. But section 84-7507 requires that the State Department of Revenue make the final classification for each unit of local government. No other statute in the Revised Codes of Montana gives a state agency such comprehensive authority over local land use matters. Perhaps more significantly, section 84-7508 requires the Department of Revenue's approval of any change in a local classification scheme.

Encourage Higher Densities and Constrain Urban Sprawl

As with its objective of preserving agricultural land, MELDA seeks to accomplish its residential land use goals by increasing or decreasing the tax value of residential land. Under the Act, if land classified as residential is developed in such a way that the overall density of the surrounding area is increased significantly, the value of the land for taxation purposes will decrease [section 84-7512(1)(a)]. If the land is used for a "planned unit development" (generally clusters of moderately high density dwelling units with

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[4] For detailed analyses of the effectiveness of differential assessment or "green belt" laws in preserving agricultural land see Differential Taxation and Land Use, Ibid., and Untaxing Open Space, Executive Summary, Council on Environmental Quality, April 1976, U.S. Government Printing Office.

planned open space), it is to be evaluated at 10 percent less than normal [section 84-7512(2)(a)(i)]. If land classified as residential is used for another purpose, it is to be valued for tax purposes at 40 percent over its normal valuation unless the change is approved by the governing body [section 84-7512(1)(c)]. Land not suitable for agriculture which is used for residential purposes would be valued for tax purposes from 5 to 20 percent below normal, depending on its distance from a city or town, with the smallest reduction occurring at the greatest distance from town [section 84-7512(2)(a)(ii)]. When used for residential development, productive agricultural land would be appraised from 2 to 25 percent above its normal value depending on its distance from a city or town [section 84-7512(2)(a)(iii)].

In all of the cases noted above the tax benefit or penalty is related to the taxable value of the residential land and does not affect taxes paid on improvements. However, on a statewide basis, residential land accounts for only approximately 20 percent of the taxable valuation of all residential property. A house and lot with a $35,000 market value has, by Montana law, a taxable valuation of $4,200. At a typical total levy of 200 mills the annual tax on this property would be $840. Of this amount, the tax attributable to the residential lot would be $168.00. Thus, a 10 percent bonus or penalty for building such a house in either the "right" or "wrong" location would total $16.80 per year. In view of the many other economic and subjective factors which enter into a decision to develop or not to develop a parcel of ground, it seems improbable that such an insignificant cost or benefit would appreciably affect the location of

residential development.

Guide Commercial and Industrial Development

MELDA treats commercial and industrial properties much differently than it does agricultural and residential land. As previously indicated, the Act's tax adjustments for agricultural and residential land are relatively insignificant and would appear to be ineffective in attaining development in accordance with a land use plan MELDA does, however, offer substantial tax savings to developers of commercial and industrial properties. For example, new downtown commercial property, including both land and improvements, may not be taxed at all during the construction of the improvements, and there is no limit on the duration of the "construction period" [section 84-7513(4)(a)]. Following the construction period, the property (land and improvements) is to be placed on the tax rolls by 10 percent annual increments until 100 percent of taxable valuation is reached. In the case of new commercial developments lying within corporate boundaries but outside of the city's central business area, taxes are to be substantially reduced for three years. New commercial developments in suburban and rural areas, on the other hand, could be subjected to a tax increase of up to 25 percent per year. However, all penalties (but no bonuses) may be waived at will by the local governing body [section 84-7513(4)(b)].

MELDA's tax treatment of industrial property and improvements is determined by how well a given development is planned, its net impact on community services and facilities, and its effects on the natural environment [section 84-7516]. The very "best" industrial

development if located in an area planned for industry, would receive a 50 percent tax break on both land and improvements. If the same industry were located in an area classified as residential or agricultural, its taxes would be unaffected by MELDA. The worst industrial development, one which would impose a tax burden on the community and have other unfavorable effects, would suffer a 25 to 100 percent tax penalty, depending on its location.

At least in theory, MELDA's treatment of commercial and industrial property provides strong incentives for related economic expansion. If the Act offered the same tax incentives to agriculturalists and residential developers, which it does not, then it might provide similar stimulus to the home building industry, provide needed homes, and restrain the conversion of agricultural land. However, MELDA's approach to achieving its several stated objectives is uneven in this respect.

Effect Desirable Land Use Without Regulation

The paramount goal of MELDA is wise land use -- a functional, economic, clean and aesthetically pleasing landscape of open space and urban areas. History has shown that to attain such a landscape, the land use and development decisions of private citizens and corporations must somehow be consistent with an overall plan. Planning, zoning, subdivision regulations, building codes, public investment policies, and various environmental laws are the tools presently available for achieving good land use. While they may all be imperfect and sometimes burdensome, they present far fewer problems than

does MELDA.

It is fallacious to suggest that MELDA can replace or even supplement zoning. If a tax penalty is severe enough to actually inhibit the use of property, the tax law and its administration would be as susceptible to challenge and variance as would an overly restrictive zoning ordinance. Without zoning, MELDA would allow virtually any land use anyplace -- if the owner is willing and able to pay the tax penalty. It is incongruous to subject a land use plan, approved by the citizens and adopted by their local officials, to an implementation system which binds only those who cannot afford to pay the price of nonconformance.

It is equally unrealistic to envision the MELDA scheme as a supplement to zoning. If land is planned and zoned for industrial use, logic would dictate that it also be classified as industrial pursuant to MELDA. (The same would be true of other land use categories.) The owner of property in an area so zoned and classified would be bound by the zoning ordinance to use his property exclusively for industrial purposes and, paradoxically, would be rewarded by MELDA for doing so. By the same token, because property owners must obey zoning they could never use their land in any way which would result in the imposition of a tax penalty under MELDA.

PART TWO

Internal Problems

Nearly all of MELDA's purely internal defects are attributable to its faulty draftsmanship and indiscriminate use of terms. The following examples are illustrative of the problems created by the Act's numerous ambiguous, conflicting, and even unintelligible provisions.

1. Under section 84-7512(4) residential land which is converted to a commercial use is taxed according to the resulting change in density. However, because MELDA defines "density" as "...the number of persons living on the land...." [section 84-7504(1) (emphasis added)] density cannot be established for non-residential uses. Thus the taxation schedule provided in section 84-7512(4) is meaningless. In addition 84-7512(4) conflicts with section 84-7512(1)(c) which imposes a 40 percent penalty if residential land is altered to a non-residential use. (In the latter section, approval of the change by the governing body would waive the penalty.) Both of these sections conflict with section 84-7513(4)(a) which prohibits the taxing of land and "construction costs" of "any commercial development within a classified commercial or residential area during the construction period" (emphasis added). Following the non-taxable construction period, the cost of land and improvements are to be taxed in relation to the distance the property lies from the city's central business district [section 84-7513(4)(b)]. Thus, one type of land use change -- converting land classified as residential to a commercial use -- would be subject to two, and possibly three, con-

flicting and irreconcilable taxation systems, ranging from no payment of taxes to a 40 percent tax penalty.

2. In defining "contruction period" [section 84-7504(14)], MELDA does not impose a time limit or other standard for determining completion of a development. This would allow an almost indefinite continuation of the tax-free period [provided by section 84-7513(4)(a)] where a taxpayer never "completes" his development.

3. Section 84-7512(3) establishes a density-based taxation table for new multi-family residential land as follows:

Existing Density	Change in Density	Increase (Decrease) in Appraised Value
0 - 1	+ 50%	+ 50%
1 - 3	+ 40%	+ 25%
3.1 - 9	+ 30%	+ 25%
9.1 - 18	+ 10%	+ 2%
Over 18	No Change	No Change

This table is virtually nonsensical because it provides for a change in appraised value in only four specific situations, i.e., where the increase in density is exactly 10, 30, 40, or 50 percent. Furthermore, the table cannot accommodate a decrease in density, and, probably of most concern, it imposes greater tax penalties on greater increases in density. Thus the table discourages the use of multi-family housing to increase densities and, thereby, contravenes a stated purpose of MELDA [section 84-7503(2)].

4. Sections 84-7512(2)(a)(ii) and (iii) establish taxation provisions when residential development occurs on "nonproductive land"

and on "productive land." MELDA's definitions of these terms read as follows:

> "Productive land" means land that could be used for agricultural purposes for a profit following current land management practices in the following use categories....
> For purposes of determining whether the land could be used for a profit, the nonagricultural development value of the land shall not be considered [section 84-7504(5)].
>
> "Nonproductive land" means land which will not support growth for the production of food and fibre for profit [section 84-7504(6)].

It is unclear from this how much profit is required to make land productive and who is to determine whether land can be farmed at a profit. It also appears that the productive/nonproductive status of marginal lands could alternate with fluctuations in market prices and other economic factors which affect profit. (Incidentally, the distinction between productive and nonproductive land is made only with respect to residential development and not commercial or industrial development.)

5. Section 84-7511 provides certain tax incentives for land classified as recreational which also qualifies as agricultural land. However, MELDA makes no provision for land classified as recreational which does not qualify as agricultural land. In addition, it is unclear whether the 25 and 40 percent reductions in valuations provided by section 84-7511(3) and (6) for recreational lands are to be granted in place of the agricultural tax breaks or in addition to them.

6. MELDA's internal conflicts are illustrated by sections 84-7512 through 84-7514 and section 84-7525. The first three provisions assure that unless certain conditions are met, residential, commercial, and industrial land may not be reappraised once it has

been initially classified and appraised under the Act. Section 84-7525, however, contravenes these guarantees by stipulating that the Department of Revenue may reappraise any property at any time as part of its cyclical reappraisal plan.

7. Section 84-7526 provides that MELDA was to take effect on January 1, 1976, in cities zoned "into categories which are consistent with the provisions of the act...." The Act, however, does not indicate who is to determine consistency or whether the "cumulative" zoning widely employed by Montana's cities is "consistent" with MELDA. Cumulative zoning permits uses in zoning districts other than the primary uses established for those districts. Thus, residential and commercial uses are ordinarily permitted in industrial zones, and residential uses are permitted in commercial zones.

Conflict With and Duplications of Other Montana Statutes

One of the most confusing aspects of MELDA is its relationship to other Montana taxation and land use planning statutes. The Act's failure to properly account for these statutes has resulted in a number of seemingly irreconcilable inconsistencies illustrated by the following examples:

1. At the outset, MELDA is at odds with the fundamental requirement of Montana law (section 84-401) that all real property and improvements be assessed according to their full cash value except agricultural land which is to be assessed according to its productive capacity. MELDA superimposes over this requirement a completely different scheme of taxation based on the degree to which the actual use of land coincides with its predetermined "ideal" use. Predictably,

the conceptual and practical difficulties resulting from this apples-and-oranges crossbreeding of tax structures are staggering. A typical problem is the fact that land may be classified and taxed as agricultural land under MELDA [see 84-7504(2)] even though it is not eligible for agricultural treatment under section 84-437.2 of Montana's "Green Belt Law" which governs the taxation of agricultural land. MELDA's provisions with respect to Class D agricultural land [section 84-7510(1)] are also in direct conflict with the other provisions of Montana's tax laws. For instance, MELDA provides that Class D land may be reassessed to reflect market (presumably cash) value. Sections 84-401(2) and 84-437.3, on the other hand, stipulate all agricultural land is to be assessed exclusively according to its value as agricultural land.

2. Inconsistency also exists between the roll-back provision of section 84-437.4 (Green Belt Law) and MELDA's section 84-7510. The first of these sections stipulates that when a property owner converts agricultural land to a non-agricultural use, he must pay the difference between the taxes paid on the property during the four years preceding the conversion and the taxes which would have been paid if the property had been taxed according to its market value during this four-year period. Section 84-7510 of MELDA, however, provides for a 10-year "roll-back" tax penalty for conversion of agricultural land. The relationship between these two penalties is obscure.

3. Another area of statutory conflict concerns the tax treatment to be given the increase in the value of real property attributable to the repair, maintenance, or improvement of existing improvements.

MELDA, in sections 84-7512(1)(b) and 84-7513(2), provides that the increased value of a structure attributable to an improvement is to be added to the taxable value of the structure in five equal installments over a five-year period. On the other hand, sections 84-301 and 84-302 create a new classification for the increased value of real property attributable to improving an existing structure. Under these sections incremental increases are to be made in the assessed value of the improvement over a five-year period from six percent to 30 percent of the improvement's full value. This discrepancy appears to be irreconcilable.

4. MELDA's relationship to mill levy limits is also troublesome. The Act provides, in section 84-7520(2), that any loss in revenues attributable to MELDA is to be offset by increasing mill levies rather than by reassessing "specific property." This attempt to deal with MELDA's potentially adverse effects on revenues overlooks the fact that other state laws, sections 84-4701.2 and 16-1015, place absolute ceilings on the general purpose levies which cities and counties may impose within their jurisdictions. Thirteen of Montana's 56 counties are already at or within one-half mill of this limit, and 31 cities have reached or exceeded their statutory maximum.[5] Thus, for many cities and counties there may be no opportunity to replace revenues lost as a result of MELDA.

5. MELDA is inconsistent with Montana's existing planning and zoning enabling statutes. The first of these, sections 11-3801

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[5] Montana Taxpayers Association, Helena, Montana, Montana Property Tax Mill Levies 1976-76.

through 11-3355, authorizes the formation of city, city-county, and county planning boards and directs them to undertake the preparation of a jurisdiction-wide comprehensive land use plan. There is no hint in MELDA as to the relationship between any plan adopted pursuant to this statute and the "plan" required by MELDA. However, the plan mandated by section 84-7505 of MELDA does not appear to satisfy the traditional requirement that a comprehensive plan reflect local social and economic goals and aspirations [see sections 11-3801 and 11-3831]. On the contrary, the MELDA "plan" is to be derived from a land capability study and the plotting of existing land uses [section 84-7505(1)]. It is also significant that MELDA makes no reference to those governmental agencies, the planning boards, which traditionally have been most concerned with and involved in charting the course of development of Montana's cities and counties.

6. An important group of statutes impinged upon by MELDA are the state's zoning enabling laws contained in Chapter 27, Title 11 and Chapters 41 and 47 of Title 16 of the Revised Codes of Montana. Although MELDA's stated policy is to "institute a land use...growth program which supplements zoning" [84-7502(5)] and one of its goals is to reduce the need for zoning [section 84-7503], MELDA's relationship to traditional zoning is puzzling. For example, it is unclear whether the procedural requirements of sections 84-7503 and 84-7523 for changing classifications or boundaries of classified areas supercede the present statutory procedures for obtaining variances from and amending local zoning regulations. In addition, the conditions for issuing a variance or for rezoning land under section 84-7523(1), (2) and (3) appear to be impossible to satisfy and irreconcilable

with the criteria already imposed by American and Montana zoning case law. Subsection (3), for example, stipulates that no petition for reclassification (and therefore rezoning) may be granted unless the

> ...proposed change shall offer the community relief from impact from an outside or uncontrollable influence facing the community because of new and substantial development.

7. Another apparent conflict between MELDA and local zoning is embodied in section 84-7520(4) which authorizes the location of "hospitals, churches, rest homes, nursing homes, governmental buildings, schools, colleges, or any charitable institution operating on a nonprofit basis" in any area other than those classified as recreational or open space. This provision appears to defeat any local efforts to confine such public service land uses to appropriate locations within the community. Most observers would agree that an animal shelter, for example, no matter how commendable its function, should not be located in a residential area. However section 84-7520 (4) denies governing bodies the power to separate such incompatible uses.

Miscellaneous Practical Problems

MELDA creates several practical and administrative problems which, by themselves, would seem to render the Act impossible of implementation. Major among these is MELDA's assignment of administrative responsibilities to the Department of Revenue and the Department of Community Affairs (DCA) and the Act's potential financial impact on local governing bodies both during and following implementation.

1. MELDA requires the Department of Revenue to evaluate all local land use plans to determine whether they conform to a complex set of planning criteria [section 84-7507]. The Act also requires the Department of Revenue to review any change in any local plan (and apparently any rezoning) to determine whether it satisfies the equally complex set of conditions contained in section 84-7508. To meet its responsibilities under sections 84-7507 and 84-7508 the Department would have to develop a substantial land use planning capability and duplicate much of DCA's staffing as well as that of other agencies now involved in land use matters.

2. The Department of Community Affairs' role under MELDA may be as difficult and costly to fulfill as the Department of Revenue's. Section 84-7505(5), for example, provides that DCA (or its agent) must prepare a land use plan for any city or county which does not complete its own plan within the time limit set by the Act. This requirement would place enormous demands on the Department's resources if a significant number of local governing bodies choose not to prepare their own plans. Moreover, the necessary task of periodically reviewing and updating these plans would undoubtedly fall to the Department as well. In addition, the Act, in section 84-7510(6), provides that owners of land classified as "agricultural" may seek DCA's assistance in determining which of four subclassifications to elect for their property. In a state in which roughly 43 million acres of privately owned land are in agricultural use, the Department would most likely find it impossible to satisfy requests for such assistance without a sharp increase in staffing.

3. Of most immediate concern to cities and counties, perhaps, is the huge expense they will be forced to bear in implementing MELDA. For example, section 84-7505(3) requires that each property owner in the state be notified by registered mail of the classification proposed for his land. It has been estimated that the cost of postage alone for this mailing would exceed one million dollars. Although the 1975 Legislature did provide for some financial assistance to counties to implement MELDA (section 82-3710; Senate Bill 87), the Department of Revenue anticipates that the funds to be made available to counties under this legislation during the first two-year period will amount to $660,000--much less than would be required. Furthermore, section 82-3710 provides no financial assistance whatsoever to cities and towns.

Equally disturbing is the possibility that MELDA will cause a significant shift of the tax burden from rural to urban property and from real to personal property taxes. This shift would be felt most dramatically by towns in sparsely populated, rural counties.

Potential Constitutional Problems

In addition to the shortcomings already discussed MELDA seems ripe for attack on the following broad constitutional grounds:

1. It may be argued that the "separation of powers" doctrine is threatened by the Act's carte blanche delegation of rule-making authority to the Department of Revenue and Community Affairs. Section 84-7521 provides that:

> [t]he state administering agency shall adopt such rules and regulations pursuant to Montana Administrative Procedure Act, as are necessary for the administration of this act.

However, it is a well-established rule of administrative law that in delegating legislative authority to an administrative agency, the legislature must declare the policy or purpose of the law and must establish constraints to the power delegated. If, as in the case of MELDA, the legislature fails to prescribe with reasonable clarity the limits of the rule-making power delegated, or if those limits are too broad, the legislation may be void as a violation of the separation of powers doctrine. Not only does section 84-7521 provide no guidance to the two departments in adopting administrative rules, but the myriad of obscurities in, and questions raised by, the Act would probably necessitate wholesale exercise of rule-making powers far beyond acceptable limits.

2. The Act's second group of apparent constitutional deficiencies relate to the guarantee, contained in both the United States (Amend. 14, Sec. 1) and the 1972 Montana Constitutions (Art. II, Sec. 17) that "no person shall be deprived of life, liberty, or property without due process of law." In the case of the adoption of a "land use plan" under section 84-7505, more than ample provision is made for notice (by registered mail) to all land owners of the taxation implications of the proposed "plan" by the local governing body before it adopts the plan and submits it to the Department of Revenue. Section 74-7526, on the other hand, appears to deny residents of zoned cities and towns their right to notice of the proposed imposition of a new property tax scheme and the right to a hearing on the proposal. This section stipulates that:

> No portion of this act shall become effective until the provisions of section 84-7505 [planning, notice, and hearing

> requirements] have been met except for those portions of land classified under the provisions of Title 11, Chapter 27, R.C.M. 1947, into categories which are consistent with the provisions of this act, and as to those portions of land this act shall be effective on January 1, 1976 (emphasis added).

3. The guarantee of due process of law also requires that the powers of government be exercised under legally prescribed safeguards for the protection of individual rights and not in an unreasonable, arbitrary, or capricious manner. Three provisions of the Act seem to invite the exercise of governmental power in violation of this principle. Section 84-7512(c) provides that the valuation of property classified as residential but put to some other use shall be increased by 40 percent. This penalty is waived, however, if the governing body approves the change in use. No standards for approving such changes are provided by the Act, nor does it require that the governing body adopt any standards of its own. Similarly, section 84-7513(2) specifies that "no expansion or remodeling" of commercial facilities may occur without the prior approval of the appropriate governing body but provides no standards for approval. Later in the same section [84-7513(4)(b)(iii) and (iv)] the governing body is given blanket authority to waive the substantial tax penalties imposed by the Act on development beyond municipal boundaries. The danger of arbitrary or capricious action under these provisions is obvious.

4. The Act's greatest potential for constitutional conflict concerns the guarantees of both the United States (Amend. 14, Sec. 1) and the 1972 Montana Constitutions (Art. II, Sec. 4) that no person shall be denied the equal protection of the law and the requirements of the Montana Constitution that "[t]he state shall appraise, assess,

and equalize the valuation of all property which is to be taxed...." (Art. VIII, Sec. 3) and that "[a]ll taxing jurisdictions shall use the assessed valuation of property established by the state" (Art. VIII, Sec. 4). The Act appears to violate these precepts by authorizing, through the local option provision of section 84-7506, the use of two completely different assessment systems on a city by city and county by county basis. That section stipulates that:

> [a]fter the provisions of section 84-7505 have been complied with and all public hearings held, the local governing body may proceed directly into further implementation provided in section 84-7507 or hold an election of electors within the affected land area. If the voters reject further implementation of the classification plan, the plan may not be implemented and no new election on that plan or any other plan may be held for the period of one (1) year.

b. Section 84-7526 (quoted above in connection with due process requirements) also seems to violate equal protection guarantees by denying owners of property within zoned cities the opportunity for notice and hearings extended by section 84-7505 to all other taxpayers.

CONCLUSION AND RECOMMENDATIONS

During the last year and a half the Department of Community Affairs has invested hundreds of hours in studying and attempting to find order in the chaos of the Montana Economic Land Development Act.

These efforts have included the formulation of administrative rules to facilitate the January 1, 1976, implementation of the Act by zoned cities required by section 84-7526. These proposed rules, however, elicited virtually unanimous opposition to DCA's interpretation of MELDA. The Department subsequently requested an Attorney General's opinion clarifying section 84-7526. In responding to this request the Attorney General provided some guidance to DCA but could not dispose of many of the far ranging problems presented by the Act.

Each successive effort of the Department to understand MELDA has become entangled in a new and overwhelming wave of questions, conflicts, ambiguities, and uncertainties. As a result, DCA has found it impossible to provide for implementation of the law.

Although MELDA's objectives are laudable, the Department is now convinced that they cannot be achieved through the provisions of the Act or even through its conceptual framework. DCA further believes that the Act's deficiencies are so fundamental and so pervasive that no amount of amendment, short of repeal, can overcome them.

Recommendations

Regardless of whether good land use is to be attained through

differential assessment, regulation, or a combination of the two, sound land use planning must come first. As is the case with MELDA, the state should require that each unit of local government develop and adopt a comprehensive land use plan. However, it should be made clear that local plans are to reflect local goals and conditions. The state should establish planning guidelines and provide for state review of those aspects of the plans which have been legislatively declared to be of statewide concern. Local governments should be given a reasonable amount of time for completion of initial plans and should also be provided with adequate technical and financial assistance to carry out the task.

The concept of plan implementation through taxation should be thoroughly investigated. The legislature, through MELDA and other laws, has firmly established the precedent of using the power of taxation as a means of achieving general social objectives. The "tax expenditure"[6] approach inherent in differential assessment may, after careful research and analysis, be found to be an effective tool for influencing development decisions in accordance with a land use plan.

It is suggested, however, that before another attempt is made to develop a MELDA-like comprehensive program for achieving land use goals through differential assessment, the following must be done:

1. Identify and evaluate present real, personal, and estate

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[6] A reduction of taxes in lieu of a direct government grant in an amount equal to the difference between the normal and the preferential tax rate.

tax policies that encourage land use changes contrary to state and local land use goals;

2. Evaluate the effectiveness of various types of land use regulations in plan implementation and identify areas where implementation could be enhanced by supplementing regulations with tax incentives. For example, zoning an area industrial doesn't necessarily attract industry, nor has agricultural zoning been effective in preventing the development of agricultural land;

3. Identify those land use regulations which are effective by themselves and do not require reinforcement through differential assessment;

4. Analyze the effectiveness of present differential assessment policies in achieving their underlying social objectives;

5. Develop the capability of projecting the revenue impacts and tax shifts resulting from alternative forms of differential assessment coupled with land use planning and regulations;

6. Investigate the merits and feasibility of manipulating tax rates rather than the tax base in achieving social objectives; and

7. Reexamine the philosophical justification for those provisions of MELDA which a) legitimize undesirable land use when the property owner can afford to deviate from the comprehensive plan, and b) reward property owners for complying with zoning regulations where they exist.